Supreme Court, U.S.
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No.

In the Supreme Court of the United States

AMANDA DAVIS,
HELEN FALANGA, and
BEVERLY ISENHOUR,
Petitioners

v.

AMERISTAR CASINO, and
HARVEYS CASINO,
Respondents

On Petition For Writ Of Certiorari To The
Iowa Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

These three Petitioners, Beverly Isenhour, Amanda Davis and Helen Falanga, referred to collectively as "Falanga" all worked on the riverboat casinos in Council Bluffs, Iowa. Falanga was in the bank cage, Isenhour was a floor host and Davis was a slot machine attendant. All three were injured while working on the boats while they were moored to the banks of the Missouri River.

The sole issue is whether their claims are properly heard under the Jones Act or whether they fall under the jurisdiction of Iowa Workers' Compensation.

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STATEMENT OF PARTIES

The caption of the case contains the names of all parties to the proceedings before the Iowa Workers' Compensation Commissioner and the lower courts.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

The Petitioners, collectively "Falanga", respectfully pray that a writ of certiorari be issued to review the judgment of the Supreme Court of Iowa entered in their case on December 8, 2006.

OPINIONS BELOW

DISPOSITION BY THE IOWA WORKERS' COMPENSATION COMMISSIONER

At the agency level, Falanga and Davis were consolidated for hearing. The Iowa Workers' Compensation Commissioner Mike Trier (Commissioner) filed his appeal decision on June 22, 2004. He ruled that the Ameristar Casino boat was not a vessel in navigation and that neither Falanga nor Davis were seamen. Accordingly, the Jones Act did not apply, jurisdiction was proper before the Iowa Workers' Compensation Commissioner and remanded the cases to a Deputy for hearing on nature and extent of benefits owed. In so ruling he stated:

> Courts across the country are struggling with the applicability of the Jones Act to those vessels such as the riverboat casino in this proceeding. Claimant cites decisions in other states that casino workers on such boats do not

constitute seaman under the Jones Act. *Ketzel v. Mississippi Riverboat Amusement, LTD.*, 867 F. Supp 1260 (S.D. Miss. 1994); *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F. 3d 560 (5th Cir. 1995). Defendants counter by correctly noting that the boats in those cases never left the mooring dock. They also cite a case that applied the Jones Act to riverboat casino workers. *King v. The President Riverboat Casino*, 894 F. Supp 1008 (S.D. Miss. 1995).

The struggle is present in Iowa. One federal District Court judge sustained summary judgment to dismiss a Jones Act claim brought by a riverboat casino cocktail waitress stating that such a worker could not conceivably be considered a seaman. *Valcan v. Harvey's Casino*, 2000 U.S. Dist. LEXIS 12744 (S.D. Iowa 2000). Two other federal district judges have denied summary judgment holding that casino workers on riverboats could be found by a jury to be seaman within the Jones Act. *Lara v. Harvey's Iowa Management Co. Inc.*, 109 F. Supp. 2d 1031, 1037 (S.D. Iowa 2000); *Frederick v. Harvey's Iowa Management Co., Inc.*, 177 F. Supp. 2d 933 (S.D. Iowa 2001). In these cases, given the wording of the decisions, whether or not the vessel was in navigation did not appear to be a fighting issue. As established in *Chandris*, that issue is a matter for the finder of fact. It is the primary issue in this case.

One case that is very pertinent is *Gremillion v. Gulf Coast Catering Co.*, 904 F. 2d 290, 293

(5th Cir. 1990). The case defines that vessel status applies to a craft "whose primary mission is the transportation of cargo, equipment, or passengers over navigable waters." The case also identified characteristics that weigh heavily toward a craft not being a vessel in navigation. Those are (1) the structure is constructed primarily as a work platform, (2) the structure is moored at the time of the accident, and (3) any transportation function is merely incidental to the platform's primary purpose.

I found that the Ameristar Casino excursion gambling boat is not a vessel in navigation because its primary purpose is a platform that houses a gambling casino and it is not substantially engaged in transportation. Navigation is not a substantial part of its activities. Accordingly, neither Davis or Falanga had a substantial, employment-related, connection with a vessel in navigation. Neither performed any duties before, during, or after their injuries that related to operation of a vessel in navigation. Only one has even been on the riverboat during a cruise. An insubstantial amount of the boat's total time in operation was actually devoted to river cruises. That limited amount of time occurred only because Iowa gambling laws require cruising to create an illusion of re-living Iowa's riverboat history, not because of any business need or bonafide relationship to commercial transportation of passengers or cargo. Therefore, I conclude that neither Davis nor Falanga is a seaman within the meaning of the

> Jones Act. I conclude that this agency has jurisdiction over their claims.
>
> All these cases are fact based, each claim must be examined on its own merits and own set of facts. The cases shall be remanded back to the deputy level for a separate hearing on each claimant's entitlement to Iowa workers' compensation benefits.

It is from that ruling in the consolidated cases that Ameristar appealed to the Trial Court.

In Isenhour the Commissioner handed down his ruling on June 28, 2004. The ruling was similar but not identical to one filed in Falanga. Without citing the language, the Commissioner found that Isenhour was not a seaman and that the Harvey's Casino boat was not a vessel in navigation. From those rulings and awards Harvey's and Ameristar appealed to the Iowa District Court in Pottawattamie County.

TRIAL COURT'S RULING

The Trial Court, Honorable Judge Gordon Abel presiding upheld and affirmed the findings and holdings of the Iowa Workers' Compensation Commissioner. Ameristar and Harvey's appealed to the Iowa Supreme Court who deflected the case to the Iowa Court of Appeals.

THE HOLDING BY THE IOWA COURT OF APPEALS

In reversing the decisions of the commissioner on the Trial Court, the Iowa Court of Appeals found that the Claimant's were "seaman" and the casino boats were "vessels."

On the latter issue Justice Sackett ruled that the riverboats were vessels stating:

> Applying the definition of a vessel, as found in 1 U.S.C. §3 and explained in *Stewart*, we conclude Harvey's riverboat casino, the Kanesville Queen, and Ameristar's riverboat casino were vessels at the time of the respective employees' injuries. The relevant facts are not in dispute. As to the Kanesville Queen, the only conclusion that can be drawn from the facts is that the Kanesville Queen is "capable of being used, as a means of transportation on water." The riverboat is not moored to the shore in a semi-permanent or indefinite manner. The evidence indicates that at all times relevant to these proceedings the Kanesville Queen was either moored to the dock or in navigation on the Missouri River. The agency found "the boat was fully equipped and capable of being used as a vessel engaged in navigation." Additionally, the riverboat does in fact leave the dock and navigate the Missouri River one hundred times a year for a minimum of two hours each time out in order to comply with Iowa's gaming laws. See Iowa Admin. Code r. 491-5.6 (2001).
>
> As to Ameristar's riverboat casino, the only conclusion that can be drawn from the facts is that it is "capable of being used, as a means of transportation on water." A full marine crew is on duty at all times, including a captain, chief engineer, mate, engine room technician, and assistant engineer. The riverboat is capable of cruising on the river within five-to-fifteen

minutes throughout the year. The riverboat is regularly inspected by the Coast Guard for compliance with Coast Guard regulations. The boat does in fact leave the dock and navigate the Missouri River one hundred times a year for a minimum of two hours each time out in order to comply with Iowa's gaming laws. See *id.* Even in the winter months when the riverboat does not make regular excursions onto the river, it is never permanently moored or dry docked and is capable of cruising on the river.

On the former issue of seaman status, Justice Sackett ruled:

In order to be considered a master or member of a vessel's crew, an employee must contribute to the function of the vessel or to the accomplishment of its mission and that connection must be shown to be substantial both in nature and duration. *Id.* That the employees were members of the crews of their respective riverboats does not appear to be in dispute in this case. The mission of each riverboat was to operate as a gambling venue. In her position as a floor host on the Kanesville Queen, Isenhour contributed to the accomplishment of the riverboat's mission. Isenhour had been employed by Harvey's and worked on the Kanesville Queen for several years prior to her injury and she performed all of her job duties onboard the Kanesville Queen. In her job as a slot attendant on Ameristar's riverboat, Davis contributed to the accomplishment of the riverboat's mission.

> Davis had worked on the Ameristar riverboat for approximately two years before her injury and she performed all of her job duties aboard the riverboat. In her job as a teller on Ameristar's riverboat, Falanga contributed to the accomplishment of the riverboat's mission, Falanga had worked on the Ameristar riverboat for several years before her injury and she performed all of her job duties aboard the riverboat.

Opinion of Iowa Court of Appeals see Appendix B.

It was from that ruling of the Iowa Court of Appeals that Falanga petitioned for Further Review to the Iowa Supreme Court.

RULING BY THE SUPREME COURT OF IOWA:

The Iowa Supreme Court granted further review. The decision was filed on December 8, 2006. The Court upheld the decision of the Iowa Court of Appeals that Falanga was a seaman and that the riverboat casinos were vessels and, accordingly, their sole remedy was under the Jones Act. In so ruling the Iowa Supreme Court relied heavily on *Stewart v. Dutra*, 543 U.S. 481, 125 S. Ct.1118, 160 L. Ed. 2d 932 (2005). Justice Larson, writing for the Iowa Supreme Court stated:

> We held in *Hayden v. Ameristar Casino Council Bluffs, Inc.*, 641 N.W.2d 723 (Iowa 2002), that Jones Act preemption claims must be evaluated with the aid of a factual record because jurisdictional issues such as this involve mixed questions of law and fact. Further, claims of "seaman" status are usually

hotly contested. *Id.* At 724-25. The parties in this case made a record regarding the nature of the watercraft, and it is not disputed that the riverboats were capable of, and did, ply the waters of the Missouri River approximately 200 hours per year as required by Iowa's gaming laws.

A seaman under the Jones Act must be a member of the crew and must contribute to the function of the vessel or to the accomplishment of its mission. *Chandris*, 515 U.S. at 376, 115 S.Ct. At 2194, 132 L.Ed.2d at 317. It is undisputed that the mission of these riverboats was to provide gambling for its patrons and that these claimants contributed to that function. Applying the rationale of *Stewart*, we hold these claimants were "seamen" and the workers' compensation commission was therefore without subject matter jurisdiction to award benefits.

We affirm the decision of the court of appeals, reverse the judgment of the district court, and remade for dismissal of the workers' compensation claims.

The opinion of the Supreme Court of the State of Iowa (Appendix A) was entered on December 8, 2006.

STATEMENT OF JURISDICTION

The Iowa Supreme Court entered final judgment on December 8, 2006. The jurisdiction of this court is invoked under *28 U.S.C. 1257(a).*

STATUTORY PROVISION INVOLVED

The *Jones Act, 46 U.S.C. §688* provides:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statues of the United States, modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court in which the defendant employer resides or in which his principal office is located. *46 U.S.C. §688*

STATEMENT OF THE CASE

THE FACTS - DAVIS

Amanda Davis began working at the Ameristar Casino Riverboat (Ameristar) in Council Bluffs, Iowa, in March of 1997 as a teller on the casino boat. As part of that job she was required to count tokens and coin and make change for gambling patrons on the riverboat. Amanda was later promoted to a slot attendant in March of 1998. The slot attendant job was physically demanding requiring her to

continue carrying sacks of token and coin to resupply the slot machines on the riverboat. It was in the course of performing that job that Amanda injured her left wrist on March 17 of 1999.

It is important to note that from the time Amanda started in March of 1997 until she was injured in March of 1999, she was never on the boat when it sailed on the Missouri River. At all times she was working, the boat was moored. Also during that period of employment, she received no training or orientation in the boat, its operation, or any of its safety equipment. She cannot swim. During her entire employment with the Ameristar Casino, she was always working when the boat was moored to the bank and she was not involved in any operations other than gambling.

THE FACTS - FALANGA

Helen Falanga began working at the Ameristar at the time of its opening in 1996 and has been continuously employed there since that time.

Since 1996, she has always worked in the bank cage. Initially, she worked at impress and was later promoted to a teller. Both jobs required her to make change, move bags of token and coin and otherwise service the financial needs of the riverboat gamblers. Helen was promoted to a banker, also in the bank cage, and was still in that job at the time of the hearing. That job is also physically demanding requiring all of the duties of a teller but also dealing with the heavy bags of coin and token in and out of the casino vault which is also on the boat.

It is important to note that Helen has no knowledge nor was she ever trained in any of the boat's operation or safety equipment. She cannot swim. At no time from the time she

began in 1996 until she was injured in March of 2000 did she ever sail on the river. At all times she was working, the boat was moored to the bank to conduct its gambling operations.

Helen injured her neck in March of 2000 lifting heavy bags of coins. Since that time, she has had two neck surgeries performed, the latter being a fusion. Like Davis, at the time she was injured, the boat was moored to the bank.

THE FACTS - ISENHOUR

Beverly began working for Harvey's Casino (Harvey's) on July 15th of 1996. Her first job at Harvey's was working on the boat as a change person in the slot department. She worked that job continuously until April of 1997. She testified that she received little or no safety training in the boat or any of its life-saving equipment and that she cannot swim.

While she was employed in the slot department, she rarely, if ever, was on the boat when it sailed the river. The boat only sailed on the river during the months from April through September.

Beverly testified that the Christmas holidays were an extremely busy time on the Kanesville Queen requiring nearly continuous standing, lifting and stooping. On December 27th of 2000, she began to experience significant back pain at work after having done a great deal of lifting on a very busy shift. She testified that, when she awoke on December 28th, she had significant back pain but did report to work. She had to leave work early that day because of pain in her back. On December 29th she called in sick because of back pain. On January 26, 2001, an MRI was completed and immediately thereafter she was referred to a neurosurgeon.

Bev saw the neurosurgeon, Dr. Doran, on February 6th of 2001. They tried a course of conservative care and it was no help in alleviating her symptoms. She saw Dr. Doran again on March 20th of 2001 and he advised her that they had run out of options and recommended that she have surgery. This was approved by Harvey's and the surgery was performed on June 26th of 2001. Bev was off work after the surgery until she was released by Dr. Doran on October 30th of 2001. He gave her a permanent work restriction of no lifting in excess of ten pounds and an impairment rating of 10 percent to her body as a whole.

REASONS FOR GRANTING THE WRIT

The real heart of this dispute and the reason for granting the writ is to clarify what vessels and what individuals fall under the Jones Act. In other words who is a "seaman" and what is a "vessel in navigation" for purposes of the Jones Act?

At the time these three claimants were injured the riverboats were moored to the banks of the Missouri River at Council Bluffs, Iowa. At that time, the riverboats were required by Iowa law to cruise the river for 200 hours per year. This they did for two hours at 7:00 A.M. 100 days between May 1st and September 30th. They did not go out on the river any more than the 200 hours mandated.

The Iowa Supreme Court has ruled that Falanga was a "seaman" and that the casino boats were "vessels" and accordingly her case fell under the Jones Act. Her pending workers' compensation cases were ordered dismissed.

THE JONES ACT

The Jones Act 46 U.S.C. § 688 allows for tort based remedies to a sea-based maritime worker who is injured in the

course of his employment while attached to a vessel in navigation. To recover under the Jones Act the seaman must prove that the employer was negligent (slight) and that said negligence was a cause of the seaman's injury.

The first leg of the Jones Act case the injured worker must prove that he is a seaman. The lower courts have held that seaman status is a mixed question of law and fact. *Southwest Marine, Inc. v. Gizoni* 502 U.S.81, 112 S. Ct. 486, 116 L. Ed. 2d 405 (1991). Often this is a question for the trier of fact. *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 111 S. Ct. 807.112 Led.2d 866 (1991)

To further add confusion to this already murky area of jurisprudence the Court in *Gizoni* goes on to state "The key to seaman status is employment related connection to a vessel in navigation." *Gizoni* at 88. This leads down the trail of what is a "vessel" under the Jones Act and that will be addressed later. We will confine ourselves initially to seaman status.

SEAMAN STATUS

Probably the principal reason for granting this writ is to try and clarify who is and who is not a "seaman" for purposes of the Jones Act. There is significant conflict in the Courts, both State and Federal on this issue. One of the cases finding that a riverboat casino worker is a seaman is *Frederick v. Harvey's Iowa Management Co., Inc.* 177 F. Supp 933 (S.D. Iowa 2001). In that case, a black jack dealer on one of the casino boats sustained an injury on the boat while it was moored. In that case the Court found that the employee was a seaman and could maintain a cause of action under the Jones Act.

A second case that addresses this exact same issue is *Wiora v. Harrah's Illinois Corporation* 68.F Suppl 2d 988 (N.D. Ill. 1999) Wiora was a waitress on Harrah's Joliet's casino boat. She was injured while the boat was moored to the bank of the Illinois river. The Court found that she was a seaman and ruled that her sole remedy was under the Jones Act. The Court found:

> A review of the case law suggests that Wiora does satisfy the criteria set out to determine seaman status under the Jones Act. The Jones Act sets forth a scheme of recovery for personal injury incurred by seamen while working on a vessel in navigable waters. 46 U.S.C. App. § 688. The Jones Act provides, in relevant part.:
>
> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statues of the United States modifying or *922 extending the common law right or remedy in cases of personal injury to railway employees shall apply.
>
> A central question is whether Wiora was a seaman. To be a seaman, the employee: (1) must have duties which contribute to the function of the vessel or to accomplishment of its mission and (2) must have a connection to the vessel in navigation or to an identifiable group of such vessels that is substantial in terms of both duration and its nature. See *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 117 S.Ct. 1535, 137 L.Ed.2d 800 (1997). In *McDermott*

> *International, Inc. v. Wilander*, 498 U.S. 337, 111 S.Ct. 807, 112 L.Ed.2d 800 (1991), the United States Supreme Court held that an employee on board a vessel in navigation need not aid in navigation of the vessel in order to qualify as a seaman under the Jones Act. Rather, the Court emphasized that the term "seaman" should be defined in terms of an employee's connection to the vessel in navigation, and a necessary element of this connection is that the employee's duties contribute to the function of the vessel or the accomplishment of its mission. *Wilander*, 498 U.S. at 337-38, 111 S.Ct. 807. *Id* at 991-2

The Court went on to note that Wiora had a clear employment related connection with the riverboat casino and was therefore a "seaman" as defined in the Jones Act.

Other Courts, both State and Federal have visited this exact same issue and have found that the employee was not a seaman and therefore could not recover under the Jones Act.

In *Valcan v. Harvey's Casino*, not reported in F. Supp. 2d, 2000 WL 33673727 (S.D. Iowa 2000) the Court ruled that a cocktail waitress who collided with another employee while serving drinks is not a seaman covered by the Jones Act. In that case, Judge Wolle stated that he found the case of *Ketzel v. Mississippi Riverboat Amusement Ltd.*, 867 Fsupp. 1260 (S.D. Miss. 1994) to be very persuasive on this issue. Ketzel, a waitress, injured her knee while the casino boat was moored to the bank. The Court undertook an extensive review of the Jones Act law not only on seaman but also on vessels. In determining seaman status the *Ketzel* Court emphasized that we must examine whether or not the employment exposed the

worker to the "hazards of the sea." If it did, he was a seaman. If it did not, he was not. Judge Wolle observed:

> A worker becomes a seaman not by reason of the physical characteristics of the structure to which he is attached, but because its being operation "in navigation" exposes him to "a seaman's hazards." He is not exposed by what the vessel did in the past or by its future potential, and to give him these special benefits by mechanical definitions without the exposure is misplaced generosity...*Id.* (emphasis added). The foregoing "test" is an appropriate rendition of the guidelines set forth by *Gremillion*, See 904 F.2d at 293-94. *Id.* at 1267

and went on to rule:

> That the Biloxi Belle looks like a ship engaged in transportation of cargo or passengers is not enough. The Biloxi Belle is not equipped, nor does it serve any transportation function whatever. To conclude otherwise would be absurd. Even assuming arguendo that the Biloxi Belle is a vessel, which the Court does not decide, it is undisputed that other than shifting with the rise and fall of the gulf tide, the craft was not moving in navigable waters at the time of Ketzel's injury, nor did it expose Ketzel to the hazards of the sea as defined by the weight of relevant case law. *Id.*

A number of other state Courts have been confronted with similar cases and ruled that the employee was not a seaman for Jones Act purposes. *Winninger v. Ameristar*

Casino, Inc. 760 So.2d 1 (Miss. App. 1999); *Thompson v. Casino Magic Corp.* 708 So. 2d 878 (Miss 1998); *King v. Grand Casinos of Mississippi,* 697 So.2d 439 (Miss 1997) and *Rush v. Casino Magic Corp.,* 744 So. 2d 761 (Miss. 1999).

Perhaps one of the more interesting cases in this area is not a Jones Act case at all. *Harkins v. Riverboat Services Inc.,* 385 F3d 1099 C.A.7 (Ill 2004) is a Fair Labor Standards Act, 29 U.S.C. §213(b)(6) (FLSA) case. The plaintiffs were captain and operating crew of the riverboat Mardi Gras Casino based on Lake Michigan outside Chicago. Plaintiffs filed claims for overtime under FLSA and the defendant moved to dismiss the claims on the grounds that they were "seaman" and were therefore exempted from the FLSA. The case went to the jury who ruled favor of the riverboat. The crew appealed. The Seventh Circuit affirmed that they were seamen and thus exempted from the FLSA. The Court affirmed their seaman status because they were the actual operators of the ship responsible for its operation, navigation, maintenance, etc. Relative to their seaman status Judge Posner observed:

> The presumption could probably be rebutted in a case in which a person employed on a ship was engaged in activities that had no maritime tincture whatsoever; an example would be a waiter employed on a cruise ship to serve meals to the passengers at regular hours. He might be exposed to some of the hazards inherent in working on a ship, and this might justify classifying him as a seaman for Jones Act and maintenance-and-cure purposes, since both the statute and the admiralty doctrine concern shipboard injuries. *Dole v. Petroleum Treaters, Inc.*, 876 F.2d 518, 522-23 (5th Cir.1989). But in all other respects his working conditions might

be identical to those of waiters in conventional landlocked restaurants. The presumption is not rebuttable on this ground in the present case, however, because none of the plaintiffs is a croupier, cashier, bouncer, dealer, waiter or entertainer; all are (or so the jury could reasonably find) members of the ship's operating crew. See *Martin v. Bedell*, 955 F2d at 1035-36 (5th Cir. 1992); *Worthington v. Icicle Seafoods, Inc.*,774 F2d 349, 353 (9th Cir.1984), rev'd on other grounds, 475 U.S. 709, 106 S.Ct. 1527, 89 L.Ed.2d 739 (1986); *Walling v. Keansburg Steamboat Co.*, 162 F.2d 405, 406-08 (3d Cir.1947). *Id* at 1103

And went to muse:

We can ask the question this way: do the plaintiffs spend their time performing duties that are necessary to the operation of the Showboat because it is a ship or because it is a casino? See *Donovan v. Nekton, Inc.*, supra, 703 F2d 1148 at 1150-51 (9th Cir. 1983). A blackjack dealer does not become a seaman by virtue of leaving his job at Harrah's land-based casino and taking a job at Harrah's riverboat casino, but likewise a helmsman does not cease to be a seaman because he transfers to a casino boat that spends most of its time moored. It was for the jury to decide whether the three plaintiffs whose overtime claims survived to trial were more like the helmsman than like the blackjack dealer. *Id.*

VESSEL STATUS

For the second leg of the Jones Act the injured claimant must prove that they were injured on a "vessel in navigation". 46 U.S.C. §688.

In its opinion filed December 8, 2006 the Iowa Supreme Court addressed whether or not the riverboat casinos were vessels as defined by the Jones Act and ruled:

> *Stewart* involved a claim by a worker injured while on board a dredge called the "Super Scoop," from which a clamshell bucket is suspended beneath the water. The bucket removes slit from the ocean floor and *708 dumps the sediment onto one of two scows that float alongside the dredge. The Super Scoop has certain characteristics common to seagoing vessels, such as a captain and crew, navigational lights, ballast tanks, and crew dining area. But it lacks others. Most conspicuously, the Super Scoop has only limited means of self-propulsion. It is moved long distances by tugboat.... It navigates short distances by manipulating its anchors and cables. When dredging the Boston Harbor trench, it typically moved in this way once every couple of hours, covering a distance of 30-to-40 feet each time.
>
> 543 U.S. at 484-85, 125 S.Ct. at 1121-22, 160 L. Ed.2d at 939-40. Stewart was working on the barge as a marine engineer when he was injured. He sued under the Jones Act and the principal issue discussed by the Supreme Court

was whether the Super Scoop was a "vessel" under federal statutes. The Court noted that the federal statutory definition of vessel requires only that a watercraft be "used, or capable of being used, as a means of transportation on water" to qualify as a vessel. It does not require that a watercraft be used primarily for that purpose.

Id. at 495, 125 S.Ct. at 1128, 160 L. Ed.2d at 946 (quoting 1 U.S.C. § 3). The *Stewart* Court specifically rejected the reasoning of *DiGiovanni v. Traylor Brothers, Inc.*, 959 F.2d 1119 (1st Cir. 1992), which held that a watercraft was not a vessel under the Jones Act because its primary purpose was not navigation or commerce, and it was not in actual transit at the time of the claimant's injury. *Stewart*, 543 U.S. at 495, 125 S.Ct. at 1127-28, 160 L.Ed.2d at 946. As explained in *Stewart*, 1 U.S.C. §3 requires only that a watercraft be capable of being used as a means of transportation and does not require that transportation be the primary purpose for operating the craft. Also, the Court ruled that the watercraft need not be in motion at the time of injury because "a watercraft does not pass in and out of Jones Act coverage depending on whether it was moving at the time of the accident." *Id.* at 495-96, 125 S.Ct. at 1128, 160 L.Ed.2d at 946-47. [FN1] The Court in *Stewart* noted that the Super Scoop dredge was not only "capable of being used" to travel the water–it was actually being used for that purpose. 543 U.S. at 495, 125 S.Ct. at 1128, 160 L.Ed.2d at 946.

Harvey's Casino v. Isenhour 724 N.W.2d 705 at 707-708 (Iowa 2006). Clearly, the Iowa Supreme Court in this case relied almost exclusively on the U.S. Supreme Court's ruling in *Stewart v. Dutra* 543 U.S. 481.125 S.Ct. 1118.160 L.Ed.2d 932 (2005) to find that the riverboat casinos were vessels for purposes of the Jones Act.

This petitioner with all due respect to the Iowa Supreme Court, would allege that this reliance on *Stewart* for a Jones Act case was misplaced.

Stewart was injured as a part of the "big dig" in Boston. Dutra owned a huge dredge called "Super Scoop" and they were digging a trench in Boston Harbor. Stewart was a maintenance engineer on the dredge and was severely injured while the dredge was out in the harbor.

After the injury Stewart sued Dutra under the Jones Act 46 U.S.C. §688 alleging he was a seaman injured by Dutra's negligence. In the alternative and as part of the same complaint he filed suit under the Longshore and Harbor Workers' Compensation Act (LHWCA) 33 U.S.C. 905 (b). The LHWCA allows employees to sue the owner of a "vessel" for an injury caused by the negligence of that vessel's owner.

It is important to note that the Super Scoop had limited means of propulsion and was frequently moored for hours or days while it dredged. It was moored in the harbor and in fact, dead in the water with an engine malfunction at the time of Stewart's injury.

In the syllabus to the *Stewart* opinion the Court stated:

> Congress enacted the Jones Act in 1920 to remove the bar to negligence suits by seamen.

> Although that Act does not define "seaman," the maritime law backdrop at the time it was passed shows that "seaman" is a term of art with an established meaning under general maritime law. The LHWCA, enacted in 1927 to provide scheduled compensation to land-based maritime workers but not to "a master or member of a crew of any vessel," 33 U.S.C. §902(3)(G), works in tandem with the Jones Act: the Jones Act provides tort remedies to sea-based maritime workers and the LHWCA provides workers' compensation to land-based maritime employees. In *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, and *Chandris, Inc. v. Latsis*, 515 U.S. 347, this Court addressed the relationship a worker must have to a vessel in order to be a "master or member" of its crew. Now the Court turns to the other half of the LHWCA's equation: determining whether a watercraft is a vessel. Pp. 4-6

After Stewart filed suit Dutra moved for Summary Judgment on his Jones Act claim alleging that he was not a seaman and that Super Scoop was not a vessel in navigation. This motion was granted and Stewart's Jones Act claim was dismissed. The First Circuit granted interlocutory appeal after which they affirmed the dismissal and remanded.

On remand, with the Jones Act case dismissed, Dutra filed an identical motion for summary judgment on Stewart's LHWCA claim and it was granted on the grounds that Dutra was not the owner of the vessel. Appeal was taken and the First Circuit affirmed.

Stewart filed an application for writ of certiorari with the United States Supreme Court on both of his claims but it was granted only as to the LHWCA claim. The Supreme Court by denying the writ of certiorari in Stewart's Jones Act claims thereby tacitly affirmed the holdings of the trial court and the First Circuit.

The point here is that Stewart is *not* a Jones Act case. The sole issue in Stewart is whether or not Super Scoop was a "vessel" as defined by the LHWCA. In Stewart, the Supreme Court held that a dredge (Super Scoop) was a "vessel" but *only* for purposes of the LHWCA.

Then we must look closely at the Stewart decision. If the Supreme Court granted certiorari *only* on the LHWCA claim what comment did they make on the lower courts disposition of Stewart's Jones Act claim? This is very significant. By refusing to hear Stewart's dismissed Jones Act claim they affirmed its disposition by the First Circuit. Justice Thomas, in that regard, stated:

> Dutra moved for summary judgment on the Jones Act claim, arguing that Stewart was not a seaman. The company acknowledged that Stewart was "a member of the [Super Scoop's] crew, 230 F. 3d 461, 466 (CA1 2000); that he spent "[n]inety-nine percent of his time while on the job" aboard the Super Scoop, App. 20 (Defendant's Memorandum in Support of Summary Judgment); and that his "duties contributed to the function" of the Super Scoop, *Id.*, at 32. Dutra argued only that the Super Scoop was not a vessel for purposes of the Jones Act. Dutra pointed to the Court of Appeals' en banc decision in *DiGiovanni v.*

> *Traylor Brothers, Inc.*, 959 F. 2d 1119 (CA1 1992), which held that "if a barge...or other float's purpose or primary business is not navigation or commerce, then workers assigned thereto for its shore enterprise are to be considered seamen only when it is in actual navigation or transit at the time of the plaintiff's injury. *Id.*, at 1123 (internal quotation marks omitted). The District Court granted summary judgment to Dutra, because the Super Scoop's primary purpose was dredging rather than transportation and because it was stationary at the time of Stewart's injury.

This ruling is critical to our petition for our Writ of Certiorari. The riverboat gambling casinos are clearly not "in the business of navigation or commerce." They spend at least 98 percent of their time moored to the shore so gamblers can freely come and go. In fact, since these injuries, the boats are permanently moored and do not cruise the river at all. Further, the Supreme Court states that unless the casino boat is in navigation then injuries fall under the Jones Act if and only if the injury happens while they are "in actual navigation or transit." It is admitted in all three of these cases that the injuries occurred while the boats were moored to the riverbank. The above from the *Stewart* case seems to clearly dispose of any claim that these claimants were "seaman" as defined in the Jones Act.

The Stewart decision, as stated above, was construing the LHWCA and not the Jones Act so we argue this reliance was, at best, misplaced.

In looking at this we have to keep several things in mind:

1. The LHWCA does not define the word "vessel."
2. The purpose of the LHWCA is to provide workers' compensation benefits to land-based maritime employees.
3. Because the LHWCA does not define "vessel" the Courts have used a very broad definition for use in LHWCA cases. That definition is found in the Revised Statutes of 1873 and defines a vessel as including "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."
4. The Jones Act requires more than just a vessel. It requires a "vessel in navigation." The Stewart case is under the LHWCA so the Supreme Court does not even examine this issue in that opinion.

Accordingly, we must look past the Stewart decision to see how the Courts have defined "vessel in navigation" in the context of the Jones Act cases.

The lead case in this area is:

> *Gremillion v. Gulf Coast Catering Co.*, 904 F.2d 290, 293 (5th Cir. 1990), the court applied the following analysis to determine vessel status under the Jones Act:
>
> As general principle, where the vessel status of an unconventional craft is unsettled, it is necessary to focus upon the purpose for which the craft is constructed and the business in which it is engaged....we look to whether a

> given structure maintains or possesses (1) navigational aids, (2) lifeboats and other lifesaving equipment, (3) a raked bow, (4) bilge pumps, (5) crew quarters, and (6) registration with the Coast Guard as a vessel. In addition, the intention of the owner to move the structure on a regular basis, the ability of the submerged structure to be refloated, and the length of time that the structure has remained stationary are also relevant to the inquiry.

Vessel status is conferred upon a craft "whose primary mission is the transportation of cargo, equipment and passengers over navigable waters." *Id.* A structure whose purpose or primary business is not navigation or commerce across navigable waters may nonetheless satisfy the Jones Act vessel requirement if, at the time of the worker's injury, the structure was actually engaged in navigation.

The *Gremillion* court, at page 293-94, also identified three qualities that are considered "nonvessels" as a matter of law:

> (1) The structure is constructed primarily as a work platform;
> (2) the structure is moored or otherwise secured at the time of the accident; and
> (3) although the platform is capable of movement, and is sometimes moved across navigable waters in the course of normal operations, any transportation function is merely incidental to the platform's primary purpose.

Arguably there is a question of fact as to whether or not the riverboats possess the physical characteristics of "vessels," as well as whether its "primary mission is the transportation of cargo, equipment of passengers over navigable waters." This statement is in consideration of the facts that the casinos on the boats operate 24 hours per day, 365 days a year (8760 hours per year), but the riverboats only "transport" cargo, equipment or persons across navigable waters approximately 200 hours per year, which is about 2 percent of the time it is accomplishing its "mission."

As suggested by the *Gremillion* court, employees of the riverboats may be covered by the Jones Act only if injured in the scope of their employment at a time while the riverboat is actually navigating the river, during their mandated 200 hours per year of cruising: "A structure whose purpose or primary business is not navigation or commerce across navigable waters may nonetheless satisfy the Jones Act vessel requirement if, at the time of the worker's injury, the structure was actually engaged in navigation.": *Id.*

Given the apparent fact that the riverboats are "actually engaged in navigation" only about 2 percent of their total commercial operation, which is 24 hour "games of chance," it is arguable whether this riverboat is a "vessel in navigation" under the Jones Act. The "primary mission" does not appear to be the "transportation of cargo, equipment or passengers over navigable waters." the function or mission of the riverboats is to provide and promote entertainment and gambling.

Transportation implies the "taking up of persons or property at some point and putting them down at another." See *Gloucester Ferry Co., v. Pennsylvania*, 114 U.S. 196, 203 (1885). "Transport" is to carry or convey from one place to

another. See *Sacramento Nav. Co. v. Salz*, 273 U.S. 326, 329 (1927). The riverboats arguable do not "transport" passengers from one point to another. The riverboats merely "cruise" on the Missouri River approximately 200 hours per year to satisfy the state requirements.

The riverboats also exhibit qualities identified by the *Gremillion* court, cited above, that are considered "nonvessels" as a matter of law. The riverboats were moored or otherwise secured at the time of all three of these injuries. The riverboats are capable of movement, and for approximately 200 hours per year the riverboats did move across navigable waters in the course of its normal operations (24 hour gambling), but this "transportation" function is merely incidental to the riverboat's primary purpose: 24 hour "games of chance." As indicated above, this "transportation" accounts for merely two percent of the total commercial operation."

Given the extent of the inter-circuit and the interstate conflict on this issue of who is and who is not a seaman certiorari should be granted.

CONCLUSION

It is clear from the forgoing that there is significant interstate and inter-circuit conflict on this issue. The Supreme Court should grant certiorari in this case to clarify who is a "seaman" and what is a "vessel in navigation" for purposes of the Jones Act.

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IN THE SUPREME COURT OF IOWA

No. 68 / 04-1910

Filed December 8, 2006

HARVEY'S CASINO,

Appellant,

vs.

BEVERLY ISENHOUR,

Appellee.

AMERISTAR CASINOS COUNCIL BLUFFS, INC. and **GAB ROBINS,**

Appellants,

vs.

AMANDA A. DAVIS,

Appellee.

AMERISTAR CASINOS COUNCIL BLUFFS, INC. and **GAB ROBINS,**

Appellants,

vs.

HELEN FALANGA,

Appellee.

On review from the Iowa Court of Appeals.

Appeal from the Iowa District Court for Pottawattamie County, Gordon C. Abel, Judge.

Two riverboat casinos appeal from judgment awarding workers' compensation benefits to three claimants, and court of appeals reversed.

DECISION OF COURT OF APPEALS AFFIRMED, JUDGMENT OF DISTRICT COURT REVERSED, CASE REMANDED.

William D. Gilner and Scott A. Lautenbaugh of Nolan, Olson, Hansen & Lautenbaugh, LLP, Omaha, Nebraska, for appellant Harvey's Casino.

John B. Morrow and Tiernan T. Siems of Erickson & Sederstrom, P.C., Omaha, Nebraska, and Michael J. Obradovich, Omaha, Nebraska, for appellants Ameristar Casinos Council Bluffs, Inc. and Gab Robins.

Jacob J. Peters of Peters Law Firm, P.C., Council Bluffs, for appellees.

LARSON, Justice.

Three workers' compensation claimants, Amanda Davis, Helen Falanga, and Beverly Isenhour, claimed benefits for injuries sustained while employed on riverboat casinos in Council Bluffs. The Workers' Compensation Commissioner ruled that the commission had subject matter jurisdiction to award benefits, and the district court agreed. The court of appeals reversed, holding that the claimants were "seamen" working on vessels for which the Federal Jones Act provided exclusive benefits. We affirm the court of appeals decision, reverse the district court, and remand.

I. Facts and Prior Proceedings.

Amanda Davis and Helen Falanga were injured while employed on the Ameristar Casino Riverboat in Council Bluffs as a slot machine attendant and "banker," respectively. Beverly Isenhour was a floor host on Harvey's Casino Riverboat in

Council Bluffs. All three claimed injuries sustained in their employment and filed workers' compensation claims under Iowa Code chapter 85 (2001). The three claims were eventually consolidated, and the district court, on judicial review, affirmed the Workers' Compensation Commissioner's ruling that the commission had jurisdiction to award benefits because the claims were not preempted by the Jones Act. The basis for the district court's ruling was that the claimants were not seamen and the riverboat casinos were not vessels as required for coverage under the Jones Act. The court of appeals reversed, ruling that the Workers' Compensation Commission lacked jurisdiction to award benefits, based largely on a Supreme Court case decided after the district court's ruling—*Stewart v. Dutra Construction Co.*, 543 U.S. 481, 125 S. Ct. 1118, 160 L. Ed. 2d 932 (2005). On this further review, the claimants argue that the court of appeals erred in relying on *Stewart* because that case is distinguishable.

II. Standard of Review.

Our review of agency action is for correction of errors at law. *Gates v. John Deere Ottumwa Works*, 587 N.W.2d 471, 474 (Iowa 1998). Review is governed by Iowa Code section 17A.19. This court is bound by the factual findings made by the agency if those findings enjoy substantial support on the record made before the agency. *Id.* This court will liberally construe Iowa's workers' compensation statutes for the benefit of the injured employee. *Caterpillar Tractor Co. v. Shook*, 313 N.W.2d 503, 505-06 (Iowa 1981).

III. Resolution.

Under Iowa Code section 85.1(6), if an injured worker is covered by a compensation statute enacted by Congress, the worker is not covered by Iowa's workers' compensation law.

In this case, Harvey's and Ameristar argue that the injured employees are covered by the Federal Jones Act, which provides in relevant part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply.

46 App. U.S.C. § 688(a).

Harvey's and Ameristar argue that the employees were "seamen" under this act, and therefore the Workers' Compensation Commission lacked subject matter jurisdiction to award benefits. The term "seaman" is not defined in the Jones Act, apparently because it was believed to be a term of art with an established meaning under general maritime law. *Stewart*, 543 U.S. at 487, 125 S. Ct. at 1123, 160 L. Ed. 2d at 941. Congress, however, provided some guidance in 1927 when it enacted the Longshore and Harbor Workers' Compensation Act (LHWCA), which provides compensation to land-based maritime workers, but excludes from its coverage "a master or member of a crew of any vessel." 33 U.S.C. § 902(3)(G). This exception has been described as "a refinement of the term 'seaman' in the Jones Act . . . ." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 347, 111 S. Ct. 807, 813, 112 L. Ed. 2d 866, 877 (1991). The Supreme Court has articulated two "essential requirements" for seaman status under the Jones Act:

> First, . . . "an employee's duties must 'contribut[e] to the function of the vessel or to the accomplishment of its mission.' ". . .
> Second, and most important for our purposes here, a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature.

Chandris, Inc. v. Latsis, 515 U.S. 347, 368, 115 S. Ct. 2172, 2190, 132 L. Ed. 2d 314, 337 (1995) (quoting *McDermott Int'l*, 498 U.S. at 355, 111 S. Ct. at 817, 112 L. Ed. 2d at 882). Therefore, in order to be a "seaman," the employee must have a substantial connection to a "vessel," and the employee must contribute to the function of the vessel or to the accomplishment of its mission. The Court further explained:

> The fundamental purpose of this substantial connection requirement is to give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea.

Chandris, 515 U.S. at 368, 115 S. Ct. at 2190, 132 L. Ed. 2d at 337.

> "If it can be shown that the employee performed a significant part of his work on board the vessel on which he was injured, with at least some degree of regularity and

> continuity, the test for seaman status will be satisfied."

Id. at 368-69, 115 S. Ct. at 2190, 132 L. Ed. 2d at 337-38 (quoting 1B A. Jenner, *Benedict on Admiralty* § 11a, at 2-10.1 to 2.11 (7th ed. 1994)).

The following rule of thumb was established:

> A worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act.

Id. at 371, 115 S. Ct. at 2191, 132 L. Ed. 2d at 339.

Stewart involved a claim by a worker injured while on board a dredge called the "Super Scoop,"

> from which a clamshell bucket is suspended beneath the water. The bucket removes silt from the ocean floor and dumps the sediment onto one of two scows that float alongside the dredge. The *Super Scoop* has certain characteristics common to seagoing vessels, such as a captain and crew, navigational lights, ballast tanks, and a crew dining area. But it lacks others. Most conspicuously, the *Super Scoop* has only limited means of self-propulsion. It is moved long distances by tugboat. . . . It navigates short distances by manipulating its anchors and cables. When dredging the Boston Harbor trench, it typically moved in this way once every couple of hours, covering a distance of 30-to-50 feet each time.

543 U.S. at 484-85, 125 S. Ct. at 1121-22, 160 L. Ed. 2d at 939-40. Stewart was working on the barge as a marine engineer when he was injured. He sued under the Jones Act, and the principal issue discussed by the Supreme Court was whether the *Super Scoop* was a "vessel" under federal statutes. The Court noted that the federal statutory definition of vessel

> requires only that a watercraft be "used, or capable of being used, as a means of transportation on water" to qualify as a vessel. It does not require that a watercraft be used *primarily* for that purpose.

Id. at 495, 125 S. Ct. at 1128, 160 L. Ed. 2d at 946 (quoting 1 U.S.C. § 3). The *Stewart Court* specifically rejected the reasoning of *DiGiovanni v. Traylor Brothers, Inc.*, 959 F.2d 1119 (1st Cir. 1992), which held that a watercraft was not a vessel under the Jones Act because its primary purpose was not navigation or commerce, and it was not in actual transit at the time of the claimant's injury. *Stewart*, 543 U.S. at 495, 125 S. Ct. at 1127-28, 160 L. Ed. 2d at 946. As explained in *Stewart*, 1 U.S.C. § 3 requires only that a watercraft be capable of being used as a means of transportation and does not require that transportation be the primary purpose for operating the craft. Also, the Court ruled that the watercraft need not be in motion at the time of injury because "a watercraft [does not] pass in and out of Jones Act coverage depending on whether it was moving at the time of the accident." *Id.* at 495-96, 125 S. Ct. at 1128, 160 L. Ed. 2d at 946-47.1 The Court in *Stewart* noted that the *Super Scoop* dredge was not only "capable of being used" to travel the water—it was actually being used for that purpose. 543 U.S. at 495, 125 S. Ct. at 1128, 160 L. Ed. 2d at 946.

We held in *Hayden v. Ameristar Casino Council Bluffs, Inc.*, 641 N.W.2d 723 (Iowa 2002), that Jones Act preemption claims must be evaluated with the aid of a factual record because jurisdictional issues such as this involve mixed questions of law and fact. Further, claims of "seaman" status are usually hotly contested. *Id.* at 724-25. The parties in this case made a record regarding the nature of the watercraft, and it is not disputed that the riverboats were capable of, and did, ply the waters of the Missouri River approximately 200 hours per year as required by Iowa's gaming laws.

A seaman under the Jones Act must be a member of the crew and must contribute to the function[1] of the vessel or to the accomplishment of its mission. *Chandris*, 515 U.S. at 376, 115 S. Ct. at 2194, 132 L. Ed. 2d at 317. It is undisputed that the mission of these riverboats was to provide gambling for its patrons and that these claimants contributed to that function. Applying the rationale of *Stewart*, we hold these claimants were "seamen" and the workers' compensation commission was therefore without subject matter jurisdiction to award benefits.

We affirm the decision of the court of appeals, reverse the judgment of the district court, and remand for dismissal of the workers' compensation claims.

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[1] We reject the claimant's argument that *Stewart's* definition of vessel is inapposite in this case on the ground that *Stewart* was decided under the LHWCA and not the Jones Act. The Supreme Court made it clear in *Stewart* that the term "vessel" was interchangeable under both statutes. *Id.* at 491-92, 125 S. Ct. at 1125, 160 L. Ed. 2d at 944.

DECISION OF COURT OF APPEALS AFFIRMED, JUDGMENT OF DISTRICT COURT REVERSED, CASE REMANDED.

All justices concur except Hecht and Appel, JJ., who take no part.

IN THE COURT OF APPEALS OF IOWA
No. 5-850 / 04-1910
Filed February 1, 2006

HARVEY'S CASINO,

Petitioner-Appellant,

vs.

BEVERLY ISENHOUR,
Respondent-Appellee.

AMERISTAR CASINOS COUNCIL BLUFFS, INC.,
and GAB ROBINS,

Petitioners-Appellants,

vs.

AMANDA A. DAVIS,

Respondent-Appellee.

AMERISTAR CASINOS COUNCIL BLUFFS, INC.,
and GAB ROBINS,

Petitioner-Appellants,

vs.

HELEN FALANGA,

Respondent-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Gordon C. Abel, Judge.

Harvey's Casino and Ameristar Casinos Council Bluffs, Inc. appeal after the workers' compensation commissioner determined that the agency had subject matter jurisdiction to hear the employees petitions.
REVERSED.

Scott A. Lautenbaugh and William D. Gilner of Nolan, Olson, Hansen & Lautenbaugh, LLP, Omaha, Nebraska, for appellant.

John B. Morrow and Tiernan T. Siems of Erickson & Sederstrom, P.C., Omaha, Nebraska, for appellant.

Michael Obradovich, Omaha, Nebraska, for appellant.

Jacob J. Peters of Peters Law Firm, Council Bluffs, for appellees.

Considered by Sackett, C.J., and Vogel and Eisenhauer, JJ.

SACKETT, C.J.

Harvey's Casino and Ameristar Casinos Council Bluffs, Inc. appeal after the workers' compensation commissioner found that certain employees were not "seamen" for purposes of the Jones Act, 46 U.S.C. app. § 688 (2001). The district court affirmed the agency. The agency concluded the employees were not seamen because the agency found that the riverboat casinos on which the employees worked were not "vessels in navigation." The result of the conclusion the employees were not seamen was that the workers'

compensation commissioner had subject matter jurisdiction to hear the petitions of the employees. On appeal, Harvey's and Ameristar argue the agency erred in finding their riverboats were not vessels in navigation and that the agency had subject matter jurisdiction to hear the petitions. We reverse the agency decision and dismiss the employees' petitions for workers' compensation benefits for lack of subject matter jurisdiction.

I. BACKGROUND FACTS AND PROCEEDINGS.

This appeal results after the cases involving Beverly Isenhour, Amanda Davis, and Helen Falanga (collectively referred to as the "employees") were consolidated into one case for judicial review of the agency action and the district court affirmed the agency. In separate actions at the agency level, Harvey's and Ameristar contended the Iowa Workers' Compensation Commissioner did not have subject matter jurisdiction to hear the claims of the employees because they were "seamen" within the contemplation of the Jones Act and, therefore, the Jones Act provided the exclusive remedy for the employees.

On July 23, 2001, Isenhour filed a petition with the workers' compensation commissioner. She claimed to have sustained injuries while working on a riverboat casino owned by Harvey's, the Kanesville Queen. Davis filed a petition with the workers' compensation commissioner on March 5, 2001, alleging that she sustained injuries while working on a riverboat casino owned by Ameristar. Falanga filed a petition with the workers' compensation commissioner on August 3, 2001, alleging that she sustained injuries while working on a riverboat casino owned by Ameristar.

Harvey's and Ameristar filed motions to dismiss for lack of subject matter jurisdiction in the cases against them.

Iowa Code section 85.1(6)(2001) provides that injured workers covered by a method of compensation established by the Congress of the United States are exempt from coverage by Iowa's workers' compensation law. Harvey's and Ameristar argued that the employees were covered by the Jones Act, and thus they were exempt from coverage by Iowa's workers' compensation law. Initially, the respective deputy assigned to each case granted the motions and dismissed the petitions for lack of subject matter jurisdiction. After a series of administrative appeals and evidentiary hearings, the agency reversed the decision on the issue of subject matter jurisdiction. On June 22, 2004, the workers' compensation commissioner held that the Ameristar riverboat casino was not a vessel in navigation and Davis and Falanga were not seamen within the meaning of the Jones Act. Therefore, the commissioner ruled that the Iowa Workers' Compensation Commission had jurisdiction and the cases were remanded to a deputy for a hearing. A week later, the commissioner handed down a similar decision in Isenhour's case. The commissioner then awarded Isenhour forty-five percent industrial disability.

The cases of Isenhour, Davis, and Falanga were consolidated into one action when judicial review was taken by the district court. The district court affirmed the agency. The district court concluded Harvey's and Ameristar did not prove "by a greater weight of the evidence" that the riverboat casinos were vessels in navigation and that the employees were seamen at the time of the various injuries. The district court agreed with the agency's assessment that the riverboats were merely platforms for gambling, that the riverboats spent ninety-eight percent of their time moored to the shore, and thus the riverboats were not vessels in navigation. Without an employment-related connection to a vessel in navigation, the district court concluded the employees were not seamen as

contemplated by the Jones Act. Therefore, the Jones Act did not remove the agency's jurisdiction to hear these cases.

Harvey's and Ameristar appeal, arguing that their riverboat casinos are vessels in navigation and the employees were seamen within the meaning of the Jones Act, and therefore the Jones Act supplied the exclusive remedy for the employees.

II. SCOPE OF REVIEW.

Our review of the agency's decision is on error. *Gates v. John Deere Ottumwa Works*, 587 N.W.2d 471, 474 (Iowa 1998). We are bound by factual findings made by the agency so long as those findings enjoy substantial support in the record made before the agency. *Id.*

III. ANALYSIS.

Iowa Code section 85.1(6) provides that injured workers covered by a method of compensation established by the Congress of the United States are exempt from coverage by Iowa's workers' compensation law. Harvey's and Ameristar argued that the employees were covered by the Jones Act, 46 U.S.C. app. § 688, a method of compensation established by the Congress of the United States for maritime workers, and therefore the workers' compensation commission, pursuant to section 85.1(6), did not have subject matter jurisdiction to hear the employees' petitions.

As required, an evidentiary hearing was held on the jurisdictional issue at the agency level in each case. *Hayden v. Ameristar Casino Council Bluffs, Inc.*, 641 N.W.2d 723, 724-25 (Iowa 2002). The agency concluded the employees were not seamen within the meaning of the Jones Act, and the federal

statute did not preempt the agency's jurisdiction. The district court affirmed.

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The Jones Act provides that any seaman who has suffered a personal injury in the course of employment may maintain an action for damages against the employer. 46 U.S.C. app. § 688(a). The focal issue in the present case is whether the employees were seamen as contemplated by the Jones Act. In order to be considered a seaman for purposes of the Jones Act, an employee must be a "master or member" of a crew of a "vessel in navigation". *Stewart v. Dutra Construction Co.*, 543 U.S. 481, __, 125 S. Ct. 1118, 1123-24, 160 L. Ed. 2d 932, 942-43 (2005). We are called upon to resolve whether the riverboat casinos involved in the present case were "vessels in navigation" at the time the employees were injured. The Supreme Court's *Stewart* opinion explains the term "vessel" as it is used in the Jones Act.[2] *Id.* In defining the term the Court relied upon section three of the Revised Statutes of 1873, which was repealed and recodified as part of the Rules of Construction Act, 1 U.S.C. § 3. *Id.* Section 3 states: "The word 'vessel' includes every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3. Applying this definition, the Court held that a dredge that had only limited means of independent propulsion was a vessel because it was capable of being used as a means of transportation on water. *Stewart*, 543 U.S. at __, 125 S. Ct. at 1129, 160 L. Ed. 2d at 947. In so holding, the Court expressly

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[1] While the statute at issue in *Stewart* was the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905, the Jones Act and the LHWCA are statutes that "work in tandem" and use and define the term "vessel" in the same manner. *Stewart*, 543 U.S. at __, 125 S. Ct. at 1123, 160 L. Ed. 2d at 942.

disavowed the test applied by the court below, which was essentially the same test applied by the agency and the district court in the present case. The Court held that a watercraft need not be primarily used for transportation purposes, as 1 U.S.C. § 3 only requires that the watercraft be "capable of being used, as a means of transportation on water" to qualify as a vessel. *Id.* at __, 125 S. Ct. at 1128, 160 L. Ed. 2d at 946. Additionally, the Court held that it did not matter whether the watercraft was in motion in order for it to qualify as a vessel because "a watercraft does not pass in and out of Jones Act coverage depending on whether it was moving at the time of the accident." *Id.*

As a final matter, the Court recognized it was possible that a watercraft that had once been a vessel could cease being a vessel. *Id.* at __, 125 S. Ct. at 1127, 160 L. Ed. 2d at 945-46. This is where the necessity that the vessel be "in navigation" becomes important. *Id.* at __, 125 S. Ct. at 1128, 160 L. Ed. 2d at 947. The Court stated that the "in navigation" requirement was "never meant to indicate that a structure's locomotion at any given moment matters. Rather, the point was that structures may lose their character as vessels if they have been withdrawn from the water for extended periods of time." *Id.* The Court asserted that "a watercraft is not 'capable of being used' for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement." *Id.* As examples of such instances the Court cited a case where a floating casino was moored to the shore in a semi-permanent or indefinite manner. *Id.* In that case the watercraft

> was moored to shore by lines tied to sunken steel pylons that were filled with concrete. The first level of the [watercraft] was connected to the pier by steel ramps, and the second level

> was joined to a shore-side building. In addition, numerous shore-side utility lines—telephone, electric, gas, sewer, domestic fire and water, cable TV, and computer–were connected permanently (or at least indefinitely) to the watercraft.

Pavone v. Mississippi Riverboat Amusement Corp., 52 F.3d 560, 564 (5th Cir. 1995). Additionally, the Court noted that a watercraft that had a large opening cut into its hull, rendering it incapable of moving over water, would not meet the Jones Act definition of a vessel in navigation. *Stewart*, 543 U.S. at __, 125 S. Ct. at 1127, 160 L. Ed. 2d at 946 (citing *Kathriner v. UNISEA, Inc.*, 975 F.2d 657, 660 (9th Cir. 1992)).

Applying the definition of a vessel, as found in 1 U.S.C. § 3 and explained in *Stewart*, we conclude Harvey's riverboat casino, the Kanesville Queen, and Ameristar's riverboat casino were vessels at the time of the respective employees' injuries. The relevant facts are not in dispute. As to the Kanesville Queen, the only conclusion that can be drawn from the facts is that the Kanesville Queen is "capable of being used, as a means of transportation on water." The riverboat is not moored to the shore in a semi-permanent or indefinite manner. The evidence indicates that at all times relevant to these proceedings the Kanesville Queen was either moored to the dock or in navigation on the Missouri River. The agency found "the boat was fully equipped and capable of being used as a vessel engaged in navigation." Additionally, the riverboat does in fact leave the dock and navigate the Missouri River one hundred times a year for a minimum of two hours each time out in order to comply with Iowa's gaming laws. *See* Iowa Admin. Code r. 491-5.6 (2001).

As to Ameristar's riverboat casino, the only conclusion that can be drawn from the facts is that it is "capable of being used, as a means of transportation on water." A full marine crew is on duty at all times, including a captain, chief engineer, mate, engine room technician, and assistant engineer. The riverboat is capable of cruising on the river within five-to-fifteen minutes throughout the year. The riverboat is regularly inspected by the Coast Guard for compliance with Coast Guard regulations. The boat does in fact leave the dock and navigate the Missouri River one hundred times a year for a minimum of two hours each time out in order to comply with Iowa's gaming laws. *See id.* Even in the winter months when the riverboat does not make regular excursions onto the river, it is never permanently moored or dry docked and is capable of cruising on the river.

In addition to finding the employees were working on a "vessel," we must also find that the employees were "master[s] or member[s]" of their respective vessel's crew in order to conclude that the employees were seamen, for purposes of the Jones Act, at the time of their injuries. *Stewart*, 543 U.S. at __, 125 S. Ct. at 1127, 160 L. Ed. 2d at 946 (citing *Chandris, Inc. v. Latsis*, 515 U.S. 347, 376, 115 S. Ct. 2172, 2194, 132 L. Ed. 2d 314, 347 (1995)). In order to be considered a master or member of a vessel's crew, an employee must contribute to the function of the vessel or to the accomplishment of its mission and that connection must be shown to be substantial both in nature and duration. *Id.* That the employees were members of the crews of their respective riverboats does not appear to be in dispute in this case. The mission of each riverboat was to operate as a gambling venue. In her position as a floor host on the Kanesville Queen, Isenhour contributed to the accomplishment of the riverboat's mission. Isenhour had been employed by Harvey's and worked on the Kanesville Queen for several years prior to her injury

and she performed all of her job duties onboard the Kanesville Queen. In her job as a slot attendant on Ameristar's riverboat, Davis contributed to the accomplishment of the riverboat's mission. Davis had worked on the Ameristar riverboat for approximately two years before her injury and she performed all of her job duties aboard the riverboat. In her job as a teller on Ameristar's riverboat, Falanga contributed to the accomplishment of the riverboat's mission. Falanga had worked on the Ameristar riverboat for several years before her injury and she performed all of her job duties aboard the riverboat.

Each of the employees were members of the crews of the vessels on which they were employed; therefore, we conclude they were seamen as contemplated by the Jones Act at the time of their injuries. Because the employees are covered by a method of compensation established by the Congress of the United States, they are exempt from coverage by Iowa's workers' compensation law. Iowa Code § 85.1(6). The workers' compensation commissioner was without subject matter jurisdiction to hear the employees' petitions. We reverse the decision of the agency and the district court and dismiss the petitions of the employees.

REVERSED.

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

HELEN FALANGA,	:	
Claimant,	:	File No. 5001228
vs.	:	
AMERISTAR CASINO COUNCIL BLUFFS, INC.,	:	
Employer,	:	APPEAL
and	:	DECISION
GAB ROBINS,	:	
Insurance Carrier, Defendants.	:	Head Note No.:2301

AMANDA DAVIS,	:	
Claimant,	:	
vs.	:	
AMERISTAR CASINO,	:	File No. 1283078
Employer,	:	APPEAL
and	:	DECISION

GAB, :
: Head Note No.: 2301
Insurance Carrier, :
Defendants. :

This decision addresses appeals by Amanda Davis and Helen Falanga from decisions on remand filed September 9, 2003. In the decisions, the deputy commissioner dismissed the claims for lack of subject matter jurisdiction finding that Davis and Falanga were seamen within the meaning of the Jones Act, an act of Congress that provides compensation to seamen for injuries incurred while serving on vessels in navigation. These claims are consolidated for the purpose of this appeal.

The record, with includes the transcript of the hearing and an affidavit of Mark Haversack submitted with the original motion to dismiss, has been reviewed de novo on appeal.

ISSUES ON APPEAL

The sole issue raised on appeal is the whether the deputy erred in concluding that this agency lacks subject matter jurisdiction.

FINDINGS OF FACT

At the time of their alleged work injuries, both claimants were employed, full time, by Ameristar Casino, a licensed excursion gambling boat as defined in chapter 99F of the Iowa Code. The boat was moored on the Missouri river at a dock located in Council Bluffs, Iowa. Permanent support facilities are constructed adjacent to the riverboat mooring site which provides services to gambling customers.

Both claimants in this proceeding have pending claims under the Jones Act in the Iowa District Court for Pottawattamie County. At the time of the remand hearing, there had been no judicial determination of the applicability of the Jones Act to the injuries sustained by these claimant's. The court stayed the Jones Act proceedings pending the outcome of this proceeding.

At the time of her alleged injury, Amanda Davis was performing the job of slot attendant (a person who assists customers playing slot machines). (Transcript, page 13) At the time of her alleged injury, Helen Falanga was a banker (a person who assists tellers in handling money for customers). (Tr., p. 29) Both worked solely in furtherance of the casino's gambling operations. Neither claimant assisted in the marine operations of the riverboat. Both performed their job duties at the time of their respective alleged injuries 100 percent of the time on board the casino boat. Only Falanga has ever been aboard the boat when it was cruising despite working at the casino for a number of years and that event occurred only once shortly before the remand hearing conducted in this proceeding. (Tr., pp. 23, 32) There is no claim that either of these claimants was injured when the boat was cruising.

The Ameristar Casino boat's primary business is to be a casino. (Tr., p. 46) The casino operates 24 hours a day, 7 days a week, 365 days a year. (Tr., p. 44) The boat has no function beyond serving as the location for the casino. According to Jody Rater, Ameristar's risk manager, the boat has a capacity of 2910 persons, the vast proportion of which would be patrons of the casino. The capacity allows for 200 crew members. (Tr., p. 43) The crew consists mostly of casino employees but includes a marine crew consisting of a captain, chief engineer, mate, engine room technician, assistant engineer, deck mate, and deckhands. (Affidavit, paragraph 3 & Exhibit 45) A full

marine crew is on duty at all times but not the same persons at all times because there are no crew quarters on board. (Tr., p. 45)

Rater stated that Ameristar Casino has both land and boat based jobs. However, since no crew quarters are on-board, all employees, including the marine crew must reside at all times on land, not on the boat. In administering benefits for injured crew members, the risk manger differentiates between what she considers land and boat based crew members. Those employees whose job duties are performed less than 30 percent of the time on the riverboat are considered land based, acknowledged to be covered by Iowa workers' compensation law and are paid benefits pursuant to Iowa law. Those employees whose jobs require being physically on the boat 30 percent or more of the time are considered seaman under the Jones Act. I do not adopt Rater's procedures and conclusions.

The Ameristar Casino riverboat is equipped with 2230 adult life preservers and 223 child life preserves, ring buoys, and 2 rescue boats. (Affidavit, par. 2, Tr., p. 54) The boat has seven diesel engines. Three are dedicated to driving the propellers and four are used to generate electrical power. (Tr., p. 54) The boat is capable of cruising within 5-15 minutes. (Affidavit, par. 4, Tr., p. 55) The boat is regularly inspected by Coast Guard authorities for compliance with Coast Guard regulations. I find that the boat is a vessel because it is fully equipped as a vessel and is fully capable of engaging in navigation. Only the choice of how it is actually used determines if it actually is "in navigation."

Despite its capability, the only time the Ameristar Casino boat actually leaves the mooring dock is to comply with its Iowa gambling law license that requires it to cruise at

least two hours per day on 100 days each year. (Tr., p. 47 & Affidavit, par. 1) The risk manager could not state precisely how many hours each year they cruise but stated that it is probably about the same as the minimum hours of operation required by state law. (Tr., p. 48) A two-hour cruise consists of traveling up and down the Missouri river and then returning to the same docking location. The gambling operations continue while the boat is cruising. The gambling operation is ongoing for a computed 8,760 hours annually (24 hours per day times 365 days). I find that the Ameristar Casino engages in cruising only about 200 hours annually, 2.3 percent of the total time it engages in its overall business operations. I find that cruising is an incidental activity that is not a substantial part of the boat's activity. I do not consider the time the boat is moored at the dock with engines running to be time it is engaged in navigation, regardless of how maritime law or practices might characterize that time because nothing is being transported.

Rater's testimony establishes that Ameristar does not transport cargo or passengers other than its casino patrons and its gambling equipment during the cruises. (Tr. pp. 47, 52) There is no evidence that it generates any revenue from transporting passengers or cargo. I find that the boat does not substantially engage in the traditional maritime activity of transporting passengers or cargo.

Excursion gambling boats are a creature of Iowa's gambling law, chapter 99F. Absent the law, casinos would not be located on water and the boats would not exist. Iowa's excursion gambling boat law was created to recreate the nostalgic times of the riverboat era. The boats are required to be constructed to resemble Iowa's riverboat history. Section 99F.7(3). The operators are required to work to promote Iowa tourism. Section 99F.5. Use of the term "excursion" implies

movement or transportation but a "gambling excursion" is defined in the law as including the time when moored. Section 99F.1(8). Excursion gambling boats were created to mimic a piece of Iowa's history, but the boats are only an illusion of the past. The boats no longer operate in the transportation industry. The boats are now part of the gambling industry. The casinos are in boats, on water, and cruising only because those are the conditions for obtaining a gambling license. Iowa's gambling law was recently amended to eliminate the requirement for cruising and to allow moored barges to serve as casinos, even though they must continue to have the appearance of an historic riverboat. This legislative action further evidences the fact that the gambling excursion boats are not a bona fide part of the transportation industry and, therefore, are not engaged in navigation.

I find that the Ameristar Casino boat is not engaged in navigation because its primary purpose to serve as a platform that houses a floating casino that is tied to a dock. It does not engage substantially in transportation. It generates no revenue from transporting passengers or cargo. It cruises only when required by its gambling license. It seldom moves away from the dock; only when required by law as a condition for its gambling license. The amount of cruising it performs is 2.3 percent of the time it operates. Cruising is incidental and not a substantial part of its operations. A vessel in navigation is part of the transportation industry but a casino is part of the gambling industry. A vessel in navigation's primary business is transporting passengers or cargo but the casino's primary function and source of revenue is gambling. A vessel in navigation typically transports passengers or cargo from one location to another, something a casino boat does not do. There are excursion boats that engage in navigation by carrying passengers on site-seeing cruises as their primary function or a substantial part of multiple functions, but the amount of time

cruising is not a substantial part of the Ameristar Casino boat's operations. The law permits excursion gambling boats to engage in navigation. Section 99F.7(14). However, the Ameristar Casino boat does not engage in substantial navigation and would likely never leave the dock if not required by Iowa law.

Therefore, I find that both Davis and Falanga contributed to the function of the casino mission of the Ameristar Casino excursion gambling boat. However, I also find that neither Davis nor Falanga is a seaman who had a substantial employment-related connection with a vessel in navigation because the boat is not a vessel in navigation.

CONCLUSIONS OF LAW

Under Iowa Code section 85.1(6), injured workers covered by a method of compensation established by the Congress of the United States are exempt from coverage by Iowa workers' compensation law. The Jones Act (46 U.S.C. section 688) provides seamen with a method of compensation for their injuries while engaged in duties in furtherance of the mission of the vessel in navigation. When the federal law applies, it preempts Iowa workers' compensation law.

Defendants correctly assert that this agency has previously held that it lacks subject matter jurisdiction over injuries that occur on excursion gambling boats in Iowa due to the application of the Jones Act. *Engler v. Ameristar, II*, File No. 1216414 (App. October 29, 1999); *Hayden v. Ameristar*, File No. 1198216 (App. October 29, 1999); *Trumbauer v. Ameristar Casino Council Bluffs*, File No. 1133774 (App. October 29, 1999); *Cassatt v. Lady Luck Casino, Bettendorf*, File No. 1232051 (App. March 31, 2000). However, defendants' assertion that nothing has changed since those

rulings is incorrect. Since those decisions, the Iowa Supreme Court has held that this agency cannot summarily dismiss a claim on the basis of lack of jurisdiction without making findings of fact based upon an evidentiary showing. *Hayden v. Ameristar Casino Council Bluffs*, 641 N.W.2d 723 (Iowa 2002). All of the prior rulings were made without an evidentiary hearing. Agency precedent at that time prohibited a deputy from conducting an evidentiary hearing on a motion attacking the jurisdiction of the agency. *DeKok et. al. v. Gateway 2000 Inc.*, File Nos, 1132907, et al (App. December 20, 1996). This case was remanded in order to conduct an evidentiary hearing in this case upon the direction of the Iowa District Court pursuant to the holding in the *Hayden* case. Further, the decision of the Iowa Supreme Court in *Schmidt v. Blackhawk Fleet, Inc.*, 601 N.W2d 91 (Iowa 1999) provided added guidance on the merits of the jurisdictional issue.

Defendants challenged this agency's jurisdiction in a pre-answer motion to dismiss. In jurisdictional proceedings, claimants have the burden of proof to sustain the requisite jurisdiction. *LaRose v. Curoe*, 873 N.W. 2d 153 (Iowa 1983). But for the Jones Act, these claimants would be covered by Iowa workers' compensation law. If the Jones Act applies, the Iowa workers' compensation law is preempted. The Jones Act cases are pending in court and it would seem logical that the court would be better suited to determining the jurisdictional issue since it is a court of original and general jurisdiction. The preferred procedure would be for the court to decide if it has jurisdiction under the Jones Act and for this agency to be controlled by that determination. The court, however, stayed its proceedings leaving it to this agency to determine whether the court has jurisdiction that preempts this agency. This decision is the product of the court's directive and is subject to judicial review.

As the claimants were injured while employed in Iowa, the initial showing of jurisdiction was met. The assertion of preemption that avoids jurisdiction is an affirmative defense. Consequently, defendants in this case had the burden to prove by a preponderance of the evidence that jurisdiction lies under the Jones Act. Regardless, however, of where the burden of proof rests, the facts in this case are clear.

To constitute a "seaman" for purposes of the Jones Act, it must be shown that (1) claimants contributed to the function of the vessel or accomplishment of its mission; and, (2) claimants had a substantial, employment-related connection with a vessel in navigation. *Chandris, Inc. v. Latsis*, 515 U.S. 347; 115 S. Ct. 2172; 132 L. Ed.2d 314 (1995).

Justice O'Connor speaking for the majority of the Court in *Chandris* rejected a broader application of the Jones Act by placing key emphasis on the "substantial connection to a vessel in navigation" requirement rather than examining only the employee's contribution to the vessel or its mission. Justice O'Connor went on to explain that the determinative analysis is "status based" rather than focusing only on a snap shot in time. In other words, a land based worker would not come within the Act by simply performing a few duties on board a vessel and a seaman would not be excluded from the Act by performing some duties on shore. The issue then is a matter for the fact-finder to determine.

The majority in *Chandris* held that whether a vessel is actually "in navigation" also is a fact based inquiry. Fact-finders are to consider the times a vessel is out of navigation such as being dry docked for an extended period of time in answering this inquiry. *Id.* at 2192. Justice O'Connor instructed that to come within the Act, the worker must have a connection to a vessel in navigation (or an identifiable group of vessels)

that is substantial in terms of both duration and nature, keeping in mind that the Jones Act was intended to protect sea-based maritime workers, who ōwe their allegiance to a vessel, not land based employees who do not. *Id.* at 2194. In a recent case construing section 85.71(2), the Iowa court held that an employee who spent 2.5 percent of his working time in Iowa did not spend a substantial part of his working time in Iowa. *Heartland Exp. v. Gardner*, 675 N.W.2d 259 (Iowa 2003). Cruising during only 2.3 percent of the time the boat was in operation is not a substantial amount of navigation.

In this case, the deputy correctly determined that these claimants contributed to the vessel's mission, e.g. gambling. There is no requirement that the employee's duties be directly related to actual navigation or sailing of the vessel. *McDermott International, Inc., v. Wilander*, 498 U.S. 337, 11 S. Ct. 807, 112 L.Ed.2d 899 (1991). However, placing primary emphasis on the contribution to the vessel's mission is the type of analysis specifically rejected by the majority of Justices in *Chandris*. The applicability of the Jones Act in this case turns upon the second and key criterion of whether these claimants had a substantial connection to a vessel "in navigation."

Since *Chandris*, the Iowa Supreme Court issued a decision on the applicability of the Jones' Act for marginal vessels. In *Schmidt v. Blackhawk Fleet, Inc.*, 601 N.W.2d 93, the court held that summary judgment dismissing a claim made by a worker seeking recovery under the Jones Act was proper. Schmidt worked on navigable waters on a cleaning barge which was not self-propelled. His activities of placement and removal of navigation lights and handling ropes and lines to guide the barge, all while on the river, was held by the court to be transitory and not the work of a seaman assigned to a vessel on navigable waters. As authority, the court cited *Roth v. U.S.S. Great Lakes Fleet, Inc.*, 25 F.3d 707 (8th Cir. 1994) which held

that the Jones Act did not cover a temporary shore-based employee engaged in maintenance and painting of a ship.

Courts across the country are struggling with the applicability of the Jones Act to those vessels such as the riverboat casino in this proceeding. Claimant cites decisions in other states that casino workers on such boats do not constitute seaman under the Jones Act. *Ketzel v. Mississippi Riverboat Amusement, LTD.*, 867 F. Supp 1260 (S.D. Miss. 1994); *Pavone v. Mississippi Riverboat Amusement Corp.* 52 F.3d 560 (5th Cir. 1995). Defendants counter by correctly noting that the boats in those cases never left the mooring dock. They also cite a case that applied the Jones Act to riverboat casino workers. *King v. The President Riverboat Casino*, 894 F. Supp 1008 (S.D. Miss. 1995).

The struggle is present in Iowa. One federal district court judge sustained summary judgment to dismiss a Jones Act claim brought by a riverboat casino cocktail waitress stating that such a worker could not conceivably be considered a seaman. *Valcan v. Harvey's Casino*, 2000 U.S. Dist. LEXIS 12744 (S.D. Iowa 2000). Two other federal district judges have denied summary judgment holding that casino workers on riverboats could be found by a jury to be seaman within the Jones Act. *Lara v. Harvey's Iowa Management Co. Inc.* 109 F. Supp. 2d 1031, 1037 (S.D. Iowa 2000); *Frederick v. Harvey's Iowa Management Co., Inc.*, 177 F. Supp. 2d 933 (S.D. Iowa 2001). In these cases, given the wording of the decisions, whether or not the vessel was in navigation did not appear to be a fighting issue. As established in *Chandris*, that issue is a matter for the finder of fact. It is the primary issue in this case.

One case that is very pertinent is *Gremillion v. Gulf Coast Catering Co.*, 904 F. 2d 290, 293 (5th Cir. 1990). The case defines that vessel status applies to a craft "whose primary

mission is the transportation of cargo, equipment, or passengers over navigable waters." The case also identified characteristics that weigh heavily toward a craft not being a vessel in navigation. Those are (1) the structure is constructed primarily as a work platform, (2) the structure is moored at the time of the accident, and (3) any transportation function is merely incidental to the platform's primary purpose.

I found that the Ameristar Casino excursion gambling boat is not a vessel in navigation because its primary purpose is a platform that houses a gambling casino and it is not substantially engaged in transportation. Navigation is not a substantial part of its activities. Accordingly, neither Davis nor Falanga had a substantial, employment-related, connection with a vessel in navigation. Neither performed any duties before, during, or after their injuries that related to operation of a vessel in navigation. Only one has even been on the riverboat during a cruise. An insubstantial amount of the boat's total time in operation was actually devoted to river cruises. That limited amount of time occurred only because Iowa gambling laws require cruising to create an illusion of reliving Iowa's riverboat history, not because of any business need or bona fide relationship to commercial transportation of passengers or cargo. Therefore, I conclude that neither Davis nor Falanga is a seaman within the meaning of the Jones Act. I conclude that this agency has jurisdiction over their claims.

As these cases are fact based, each claim must be examined on its own merits and own set of facts. The cases shall be remanded back to the deputy level for a separate hearing on each claimant's entitlement to Iowa workers' compensation benefits.

Wherefore the remand decision issued by the deputy is reversed and remanded.

ORDER

It is therefore ordered that these cases are remanded to the hearing level for a separate hearing on each claimant's claim in order to determine each claimant's entitlement to benefits.

The costs of this appeal are assessed against defendants.

Signed and filed this 22nd day of June, 2004.

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